1979

State of Utah v. David Marvin Echols : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

DAVID MARVIN ECHOLS,

Defendant-Appellant.

AN APPEAL FROM
CRIME OF UNLAWFUL
WITH INTENT TO
JUDICIAL
COUNTY, STATE

BRAD RICH

Salt Lake Legal Defender
333 South Second East
Salt Lake City, Utah 84111

Attorney for Appellant

IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 16225

DAVID MARVIN ECHOLS, :

Defendant-Appellant.

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BRIEF OF RESPONDENT

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AN APPEAL FROM THE JUDGMENT AND CONVICTION OF THE CRIME OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE BRYANT H. CROFT, JUDGE, PRESIDING.

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ROBERT B. HANSEN
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

BRAD RICH

Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111

Attorney for Appellant

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STATUTES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16225
DAVID MARVIN ECHOLS,	:	
Defendant-Appellant.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by complaint and information with possession of a controlled substance with intent to distribute for value in violation of Utah Code Ann., § 58-37-8(1)(a)(ii) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury before the Honorable Bryant H. Croft of the Third Judicial District and was found guilty as charged on November 21, 1978. Following the statutory period, appellant was sentenced to an indeterminate term not to exceed 15 years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent urges the Court to affirm the conviction and sentence of the lower court.

STATEMENT OF THE FACTS

On August 24, 1978, five deputy sheriffs entered the apartment of Paul Waggaman at 140 K Street in Salt Lake City with a search warrant (R. 96, 139, 157). They searched Waggaman (R. 97, 139), and then conducted a very careful search of the entire apartment, including within the living room, "the chairs, the TVs, the corner, the tables, the couches and the entire area surrounding, under the rugs, everything." (R. 98). During this search, three balloons of heroin were found in the kitchen (R. 112). Mr. Waggaman was not placed under arrest since the officers hoped to use him to get at his supplier (R. 125).

Mr. Waggaman testified that he had called appellant earlier in the day and asked him to drop by and sell heroin to him (R. 141). Three deputies were placed on surveillance outside the apartment and officers Jim Duncan and Steve Alexander remained inside the apartment with Waggaman (R. 99). A girl who had been present when the officers arrived and who had been searched was allowed to leave (R. 109-111).

At approximately 8:30 p.m., appellant came to the apartment and was admitted by Mr. Waggaman. Appellant

walked to the living room couch and sat down (R. 99).

Officer Duncan testified:

> I approached him, said, "Hello, Dave." At which time I observed him place his right hand on the table and set his car keys down. I saw his left hand go down between his legs, at which time I approached him, held out my hand to shake his hand. I identified myself as being a police officer from the Sheriff's Office, stood him up, walked him over to the wall, placed his hands on the wall and searched him. . . .
>
> He was patted down for weapons. I walked back over to where he had been sitting on the couch, at which time I looked where his feet had been, between his legs. Observed a cellophane baggie containing several multi-colored balloons.

R. 99, 100.

It was stipulated that two of the ten balloons in the package had been tested and contained heroin (R. 133).

Officer Duncan also indicated that he had been a narcotics officer with the Sheriff's Department for four years and had extensive experience in narcotics and narcotics investigation, including attendance at some thirty seminars and participation in over 1,000 investigations, with hundreds of arrests. He stated that he had spoken with hundreds of individuals engaged in illegal narcotics activities regarding the identification and use of narcotics and testified on three occasions in Utah District Courts. (R. 93-95). He also testified that he had purchased heroin

some 200 times on the street in connection with law enforcement activites (R. 103). He indicated that, in his expert opinion, whenever heroin is possessed in quantities of over two balloons, it is being held for sale (R. 107). He also noted that a package of ten balloons was a standard order for a street dealer (R. 120).

Deputy Micahel George testified that while appellant was being transported to jail, he voluntarily stated: "There ain't no way you could have seen me throw that heroin down," (R. 164).

Greg Haynor testified for the defense that heroin addicts buy what they can afford (R. 173). He also noted, however, that although he had been able to determine from informal conversations with addicts and users how much an average user would spend per day, he was not able to determine whether a user would purchase one balloon at a time, or in larger quantities when the cash is available (R. 174).

The jury found appellant guilty as charged (R. 197). He was sentenced by the court to an indeterminate sentence at the Utah State Prison of not more than fifteen years (R. 70).

ARGUMENT

POINT I.

THE TESTIMONY OF OFFICER DUNCAN WAS PROPERLY RECEIVED AS EXPERT TESTIMONY WITH RESPECT TO THE PACKAGING, DISTRIBUTION, AND USE OF HEROIN.

In State v. Fort, 572 P.2d 1387, 1389 (Utah, 1977), this Court stated:

> The trial court has considerable latitude of discretion in determining the qualifications of a witness and the opinions of experienced law enforcement officers are competent evidence. In regard to the propriety of opinion testimony, the subject matter of heroin use is clearly beyond the general knowledge of the average person and the admission thereof would be helpful to the jury in its deliberation.

In that case, a Salt Lake County deputy sheriff who had been assigned to the narcotics division for a year and a half and had purchased narcotics in undercover activities numerous times was held to have been properly regarded by the trial court as an expert in the field of narcotics use and distribution.

In State v. Mason, 530 P.2d 795 (Utah, 1975), this Court affirmed in a case where a police officer with two and a half years experience in narcotics work had been allowed to testify as an expert. This Court stated:

> The trial judge passed upon the qualifications of the witness, and the propriety of his testimony, as was

> his prerogative. The standard rule is that with respect to such matters the trial court has considerable latitude of discretion; and the testimony will not be ruled incompetent in the absence of a clear abuse thereof.

Id. at 798. See also, State v. Bankhead, 30 Utah 2d 135, 514 P.2d 800, 803 (1973).

In the instant matter, Officer Duncan's qualificatic exceeded those of the officers in State v. Fort and State v. Mason, both supra. Officer Duncan had been with the narcotics division of the Sheriff's Office for four years and had been involved in over 1,000 investigations. He had participat in hundreds of arrests. He had interviewed hundreds of users and addicts in connection with their use of narcotics and the general identification of drugs. He had attended over 30 seminars conducted by various governmental agencies (R. 93-95). He had purchased heroin some 200 times on the street in connection with undercover activities (R. 103). Clearly, Officer Duncan was an expert in narcotics use, packaging and distribution; qualified to testify in the courts of this State. There was no abuse of discretion in admitting his expert testimony.

POINT II.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT OF GUILT IN THIS CASE.

In reviewing a claim of insufficient evidence to support a jury verdict, it is well established that:

> The weight of evidence and the credibility of witnesses are reserved exclusively for the jury, and this Court will not interfere unless the evidence is found to be so lacking and insubstantial that reasonable men could not possibly have reached a verdict beyond a reasonable doubt. Nor will we weigh conflicting evidence, the credibility of witnesses, or the weight to be given appellant's testimony. Further, unless there is a clear showing of lack of evidence, the jury verdict will be upheld.

State v. Logan, 563 P.2d 811, 813-814 (Utah, 1977). See also State v. Romero, 554 P.2d 216 (Utah, 1976); State v. Fort, supra; State v. Wilson, 565 P.2d 66 (Utah, 1977); and State v. Erickson, 568 P.2d 750 (Utah, 1977).

Utah Code Ann., § 58-37-8(1)(a)(ii) (1953), as amended, provides:

> Except as authorized by this act, it shall be unlawful for any person knowingly and intentionally: . . . (ii) To distribute for value or possess with intent to distribute for value a controlled or counterfeit substance;

The evidence in the instant matter indicated that the apartment was carefully searched and all drugs found seized before the arrival of appellant (R. 97, 98, 112). Mr. Waggaman

testified that he had contacted appellant earlier in the day and that appellant had agreed to bring some heroin to him (R. 141). Appellant was seen to have made a motion to the floor with his left hand (R. 99), and ten balloons of heroin, packaged together, were found on the floor where he had been sitting immediately after his arrest (R. 100). Two of the ten balloons were tested and stipulated to have contained heroin, a controlled substance (R. 133, and Utah Code Ann., § 58-37-4(3)(a)(i) (1953), as amended). Expert testimony indicated that a package of ten balloons was a standard "order" for a street dealer (R. 120). Finally, appellant's statement to the effect that they couldn't have seen him throw the heroin down (R. 164), indicated that he had, indeed, had possession of the heroin.

A review of this evidence indicates that appellant had possession of heroin in a quantity normally held not for personal use, but for sale and that he was, in fact, where he was because of another's request to buy heroin from him. Moreover, he attempted to conceal his possession of heroin when confronted by law enforcement officials. The elements of the crime of possession with intent to distribute for value were established. Consequently, the verdict and sentence of the lower court should be upheld.

CONCLUSION

Officer Duncan was an experienced police officer, imminently qualified to testify as to the use, packaging, and distribution of heroin in the Salt Lake Valley. There was no error in admitting his testimony on those subjects. The elements of the crime charged were all established. For these reasons, respondent urges this Court to affirm the conviction and sentence of the lower court.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

Attorneys for Respondent